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In the Supreme Court of the United States

OCTOBER TERM, 1992

COLUMBIA GORGE UNITED – PROTECTING PEOPLE AND PROPERTY, PETITIONER

v.

EDWARD R. MADIGAN, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Pursuant to the Columbia River Gorge National Scenic Area Act, 16 U.S.C. 544 *et seq.*, Congress granted its consent to an interstate compact between the States of Washington and Oregon, subject to the condition that the States form a commission in accordance with a prescribed regulatory framework to address land. management issues within the Columbia River Gorge Scenic Area. The question presented is whether the Act is within the scope of Congress's powers under Articles I and IV of the Constitution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 960 F.2d 110. The opinion of the district court (Pet. App. B1-B31) is reported at 20 Envtl. L. Rep. (Envtl. L. Inst.) 21,162.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1992. The petition for a writ of certiorari was filed on June 29, 1992 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Columbia River forms much of the border between Washington and Oregon. East of Portland, the Columbia River passes through the Columbia River Gorge, an area known for its outstanding scenery, outdoor recreational opportunities, and other amenities. The lands within the Gorge are owned by private entities, state and local governments, and the United States. To "protect and provide for the enhancement of the * * * resources" of the area, 16 U.S.C. 544a(1), and "to protect and support the economy of the Columbia River Gorge area," Section 544a(2), Congress enacted the Columbia River Gorge National Scenic Area Act (the Act), 16 U.S.C. 544 *et seq.* To achieve those ends, the Act sought to "establish a partnership between the Federal Government, the States of Oregon and Washington, and the nearly 50 units of local government within the Columbia Gorge for the purpose of protecting and enhancing" the Gorge resources through a scheme of coordinated planning and cooperative management.[1]

Although the Secretary of Agriculture is responsible for administering federal lands within certain "special management areas" described in Section 544b(b), see Section 544f(a), the Act generally contemplates that lands in the scenic area will be administered by the Columbia River Gorge Commission, which was to be formed pursuant to a compact between the States of Washington and Oregon. Congress consented to such a compact in Section 544c(a)(1), subject to the condition that the compact establish the Commission in accordance with the provisions of the Act. The Act did not require the States to pass the compact,[2] but did provide

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[1] 132 Cong. Rec. 29,496 (1986) (remarks of Sen. Hatfield).

[2] Section 544o(d) makes this clear:

that if the States did not pass such a compact, the Secretary would "not be obligated to take actions which are predicated upon the establishment of the Commission." Section 544o(e).[3]

The Commission consists of 13 members: one appointed by each of the six counties in the scenic area, three appointed by each of the two Governors, and a nonvoting member who is a Forest Service employee, appointed by the Secretary. Section 544c(a)(1)(C). The Act obligated the Commission to complete an inventory and assessment of the scenic area within its first year, Section 544d(a), develop land use designations for non-federal lands in the scenic area within the second year, Section 544d(b), and adopt a land management plan within the third year, Section 544d(c). The plan must include land use designations, as well as guidelines for the adoption of land use ordinances for the scenic area. Section 544d(c).[4] The plan is to be submitted to the Secretary for his approval, but the Commission may override any objection by a two-thirds vote. Section 544d(f). After the plan is adopted, the Commission administers the nonfederal lands in the scenic area under the plan, reviewing land use ordinances to ensure that they are consistent with

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Mandatory language in sections 544 to 544p of this title respecting the powers and responsibilities of the Commission shall be interpreted as conditions precedent to congressional consent to the interstate compact described in section 544c of this title.

[3] Oregon and Washington entered into the compact in 1987. See Or. Rev. Stat. § 196.150 (1989); Wash. Rev. Code Ann. § 43.97.015 (Supp. 1992).

[4] The plan must incorporate without change the directions for use of federal lands promulgated by the Secretary. See Sections 544d(c)(4), 544d(c)(5)(A). The guidelines for land use ordinances do not apply within certain "urban areas" described in Section 544b(e), see Section 544d(c)(5)(B).

the plan; if a county fails to submit a satisfactory land use ordinance, the Commission will promulgate a land use ordinance directly. Section 544e.[5]

Finally, pending adoption of the guidelines and land use ordinances described above, Section 554h(a) provides that the scenic area (except for urban areas) shall be administered in accordance with interim guidelines adopted by the Secretary. Major developments during that period shall be permitted by the Commission "only if it determines that such development is consistent with the standards contained in [the Act]." Section 544h(c).

2. Petitioner and others commenced this action against the Secretary of Agriculture and the Columbia River Gorge Commission, claiming that the Act is unconstitutional because it exceeds the scope of Congress's powers under Articles I and IV of the Constitution. The district court ruled for respondents. Pet. App. B1-B31. The court rejected petitioner's claim that the Act violated the Tenth Amendment, explaining that the States, by passage of the compact, had agreed to the imposition of the land use regulations required by the Act. Pet. App. B13-B14. The court also held (*id.* at B15-B18) that the Act is within Congress's power under the Commerce Clause, Art. I, § 8, Cl. 3, because the "legislative record supports a finding that the establishment of a national scenic area affects interstate commerce," both by en-

[5] The Act establishes different procedures for lands within the special management areas. Land use ordinances that the Commission approves for those areas must be submitted to the Secretary for review. Sections 544f(i)(3), 544f(j). If the county does not wish to accede to any suggested revisions of the Secretary, the Commission may issue an ordinance itself or override the Secretary's disapproval by a two-thirds vote. Section 544f(k), 544f(*l*). In that case, however, the county would not be eligible for the federal funds appropriated for payments to local governments under the Act. Section 544f(n); see Sections 544n(a)(2), 544n(b).

couraging tourism and by regulating other industries in the area. Pet. App. B16. Similarly, the court concluded (*id.* at B18-B19) that the Act is within Congress's power under the Property Clause, Art. IV, § 3, Cl. 2. Finally, the court rejected (Pet. App. B19-B21) petitioner's argument that the compact was invalid because it was based on coercion of Oregon and Washington. Noting that "[t]he states were free to reject the conditions of the Compact," the court concluded that the compact was valid and not the result of coercion. *Id.* at B21.

3. The court of appeals affirmed. Pet. App. A1-A11. The court ruled (*id.* at A6-A7) that the Act was authorized by the Commerce Clause based on Congress's "desire to preserve the beauty of the area for those who would travel to use the [amenities] in it," and Congress's desire to "regulate competing economic activities within the scenic area that are activities directly affecting interstate commerce," noting the important logging and fishing industries in the region. *Id.* at A6. Accordingly, the court had no occasion to consider whether the Property Clause afforded an independent basis for the Act. *Id.* at A7-A8. The court then rejected petitioner's argument that the Act violates the Tenth Amendment, explaining that "the Act is within the powers granted to Congress under the Commerce Clause" and thus "cannot constitute an exercise of a power reserved to the states." Pet. App. A8. Finally, the court rejected (*id.* at A8-A10) petitioner's contention that the specific regulatory framework set forth in the Act as a condition to the compact rendered the compact invalid as the product of improper coercion. The court explained: "Congress may condition consent upon a compact containing specific terms, including the creation of a compact agency." *Id.* at A9.

ARGUMENT

1. Petitioner first argues (Pet. 9-18) that the Act exceeds the authority granted to Congress by the Commerce Clause because the Act has an insufficient connection with interstate commerce. That claim plainly is meritless. As this Court has explained, the federal judiciary is limited to a "relatively narrow" inquiry in reviewing Congress's judgment that the Commerce Clause justifies a particular enactment; such enactments are within the reach of the Commerce Clause if there is "any rational basis" supporting Congress's view that the "regulated activity affects interstate commerce." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-277 (1981).

Section 544a recites that the purposes of the Act are to "provide for the enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River Gorge," and to "protect and support the economy of the Columbia River Gorge area by encouraging growth to occur in existing urban areas."[6] In light of the substantial evidence before Congress of the existing and potential tourism opportunities in the area, as well as the timber and fishing industries that potentially conflicted with preservation of the pristine scenery (see

[6] Because these provisions of the Act plainly invoke Congress's commerce power, petitioner's statement (Pet. 13) that courts should be "reluctant to hypothesize constitutional justifications for statutes where Congress provides no legitimate and clear statement of purpose" misses the mark. In any event, whether or not Congress intended to rely on the Commerce Clause, the Act must be upheld if it is within the power granted by the Commerce Clause, because "[t]he . . . constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *EEOC* v. *Wyoming*, 460 U.S. 226, 243 n.18 (1983), quoting *Woods* v. *Cloyd W. Miller Co.*, 353 U.S. 138, 144 (1948).

Pet. App. B16-B17), it was indisputably rational—if not obviously correct—for Congress to conclude that establishment of the scenic area would affect interstate commerce.

2. Petitioner also argues (Pet. 18-25) that the Act violates principles of federalism reflected in the Tenth Amendment and the Guarantee Clause, Art. IV, § 4. We disagree. The statute neither intrudes into areas of state sovereignty beyond the reach of the Commerce Clause, see *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556 (1985), nor commandeers the States' processes by "mandating state regulation," *New York* v. *United States*, 112 S. Ct. 2408, 2430-2431 (1992). First, there can be no plausible argument that the statute is invalid on the basis of the concerns addressed in *Garcia*. Other States did not circumvent "internal safeguards of the political process" to force the Act on two unwilling States, see *Garcia*, 469 U.S. at 556. Rather, the statute was enacted by Congress for the benefit of these two States, and became effective only upon the exercise by those States of their sovereign, constitutionally recognized authority to consent to a compact implementing the Act.

Similarly, the statute bears no resemblance to the statutory provision *invalidated* in *New York*, principally because the statute does not obligate the States to do anything, much less enact a regulatory scheme that Congress could not have enacted directly. Rather, like the provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 *upheld* in *New York*, the statute offers the two States significant benefits—the security of knowing that the entire area will be developed coherently, coupled with specific federal grants under Section 544n—upon the States' compliance with specified conditions. Compare *New York*, 112 S. Ct.

at 2425-2427.[7] If the States had chosen not to enter into a compact in accordance with the Act, the sole result would have been that "the Secretary shall not be obligated to take actions which are predicated upon the establishment of the Commission," Section 544o(e).

3. Finally,[8] petitioner argues (Pet. 27-29) that the Act cannot be sustained under the Compact Clause, Art. I, § 10, Cl. 3. This argument reflects a misunderstanding of the relevance of the Compact Clause. The government has not contended that the Compact Clause grants Congress the authority to pass the Act; it has contended that the compact entered into by Washington and Oregon is valid because the Act granting Congress's consent is a valid exercise of congressional power under the Commerce and Compact Clauses.

To the extent petitioner suggests that Congress did not properly act because "the states had *nothing* to do with [the Act's] detail," Pet. 27, it errs. The Compact Clause places no procedural limitations upon the manner by which Congress may grant its consent to interstate compacts. Accordingly, as this Court has held, Congress may consent to an interstate compact by authorizing

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[7] Hence, *New York* makes clear that petitioner's reliance on the "substantial grant moneys" available under the Act (see Pet. 22-23) to establish that "[t]he states had absolutely no choice but to surrender to the Act" is inadequate to show that the Act transgresses constitutional limits on congressional power. See 112 S. Ct. at 2426 (relying on, *inter alia*, *South Dakota* v. *Dole*, 483 U.S. 203 (1987)).

[8] Petitioner also argues (Pet. 25-27) that the statute cannot be sustained as an exercise of Congress's power under the Property Clause. Because the court of appeals had no occasion to consider that question, see Pet. App. A8, it is not a proper subject for certiorari, see *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984), although it would serve as an alternative ground for affirming the judgment of the court of appeals, see *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970).

joint state action in advance of the enactment of state legislation and the federal legislature may condition its consent upon the States' compliance with specified terms. *Cuyler* v. *Adams*, 449 U.S. 433, 439-441 (1981). Petitioner suggests no reason why the specificity with which Congress sets forth the conditions of its consent should be relevant to the constitutional analysis. Moreover, any lack of state involvement in development of the precise terms of the compact is irrelevant. The only requirements for a compact to bind a State are that Congress approve it and that the State enact it; the Constitution does not address the question of who drafts the document.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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